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No. 792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPH B. CRAWFORD, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITIONERS' REPLY BRIEF

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I. The Issue of Discretion

The Government, following the decision of the Court below, argues that the 1959 Act "was cast in discretionary, not mandatory trems." It reasons that "the act spoke of setting pay scales 'in relation to' domestic levels, and in ordinary usage this standard includes more flexibility than the 'equal to' requirement petitioners would read into the statute." (Mem. in Opp., p. 5)

This argument totally ignores the mandatory language of the statute directing that "The Secretary . . . *shall fix* the rates of basic compensation of teachers and teaching positions . . . *in relation to* the rates of basic compensation for similar positions in the United

States." The statute expressly required the Secretary to fix rates in accordance with a specific statutory standard. It did not give the Secretary discretion to alter that standard, or to use another standard or criterion for setting teachers' salaries.

The Government's argument that the phrase "in relation to" cannot be construed to mean "equal to" is wholly beside the point. The issue in this case is not the meaning of the statutory phrase "in relation to," but whether the Secretary had authority, under the statute, to fix teachers' salaries "in relation to" some other criterion than that provided in the Act. Petitioners do not contend that the stautory phrase "in relation to" must be defined to mean "equal to." After all, teachers' salaries in the United States are not uniform; they vary from one school district to another. It would therefore have been absurd for Congress in 1959 to have provided that overseas teachers would be compensated at rates "equal to the rates of basic compensation for similar positions in the United States."[1]

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[1] The 1966 legislation, of course, uses the phrase "equal to." But it does not employ the phrase "equal to the rates of basic compensation for similar positions in the United States." Rather, it adopts the formula developed by the Secretary of Defense under the 1959 Act, and provides that salaries shall be "equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school districts in the United States of 100,000 or more population."

In 1959, when the Act was written, there was no clear consensus with respect to a specific formula to be used in deriving a salary schedule for overseas teachers from the variety of salary schedules in effect in the United States. Therefore, in the Act Congress delegated the responsibility of developing such a formula to the Secretary of Defense.

It is precisely because United States teachers' salaries are not uniform that Congress used the phrase "in relation to" rather than "equal to." And it is for this same reason that Congress delegated to the Secretary of Defense the particular, limited authority to translate the statutory standard into specific salary figures.

In other words, the Act obviously gave the Secretary some discretion, but a discretion rigidly circumscribed by the mandatory terms of the statute. The Secretary was to determine, after consultation with appropriate teacher representatives, whether the salaries should be based upon the rates paid in a particular school district in the United States, or upon an average of the rates paid in all school districts, or selected school districts, or school districts falling within a particular population category, for example.[2] And in the exercise of *this* discretion, the Secretary decided that the appropriate standard would be the average (mean) of the rates of compensation in urban school jurisdictions of 100,000 population or over.

When the Secretary made that decision, he exhausted his statutory discretion. He had given content to the statutory standard by defining, through a concrete formula, the phrase "in relation to the rates of basic compensation for similar positions in the United States."

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[2] "I think a fair interpretation is that the Secretary is to 'refer' to stateside salaries in the sense that a mariner might 'refer' to a chart. The chart does not tell the mariner where to go but tells him how to find his destination * * *. I think the Secretary was to ascertain stateside salaries and, in the light of his findings, was to fix compensation that was at least comparable." Nichols, J. dissenting below, Pet. p. 21a. See also p. 22a.

The issue in this case, therefore, is not whether "in relation to" means "equal to." Obviously, it does not. Nor is the issue whether the Act gives the Secretary *some* discretion. Obviously, it does. The issue is whether the Secretary could legally set salaries "in relation to" the so-called per pupil limitation—a standard not mentioned in the statute—rather than "in relation to the rates of basic compensation for similar positions in the United States"—the only standard provided in the Act.

II. The Decision in Mitchell v. McNamara

The Government argues that the judgment of the Court below is supported by the decision of the District of Columbia Circuit in *Mitchell* v. *McNamara,* 352 F. 2d 700 (D.C. Cir. 1965). That case, however, was dismissed for lack of jurisdiction, without any determination on the merits.

At the time the *Mitchell* case was brought, the federal district courts did not have jurisdiction to adjudicate pay claims by Government employees. In an effort to avoid this jurisdictional problem, the plaintiffs in *Mitchell* sued for a writ of mandamus to require the Secretary of Defense to establish a salary schedule for overseas teachers which would be commensurate with the salaries paid to teachers in the United States. The Government, without filing an answer, moved to dismiss the action or, in the alternative, for summary judgment, on three grounds:

> "1. The plaintiffs lack standing to sue the United States and their complaint fails to state a justiciable controversy between plaintiffs and the United States;

> "2. This is an action against officers of the United States which constitutes an action against the United States to which the United States has not consented; and
>
> "3. The issuance of the mandamus prayed for in this action would be an unauthorized interference with the discretionary functions of the Executive officers of the United States and a judicial interference with the Executive Branch of Government in violation of the constitutional separation of powers." (Joint Appendix in *Mitchell* v. *McNamara,* D.C. Cir. No. 19,132, at pp. 12-13)

The plaintiffs cross-moved for summary judgment. The District Court then denied *both* motions for summary judgment, but dismissed the complaint for lack of jurisdiction. On appeal, the Court of Appeals affirmed, with a brief *per curiam* opinion in which it stated:

> "We think that the complaint was properly dismissed for lack of jurisdiction. In our view this is an unconsented suit against the United States; and in any case mandamus is not available because the courts will not interfere with the exercise of executive discretion in situations as confused and difficult as the present." 352 F. 2d at 701.

It is plain that the Court in the *Mitchell* case did not reach the merits of the controversy at all. Rather, it accepted the Government's argument that it lacked jurisdiction to adjudicate the controversy.

The fact that the court dismissed the complaint, and denied summary judgment, makes it clear that its decision cannot be construed as judicial approval of the Secretary's interpretation and administration of the Act. The dismissal of the complaint necessarily as-

sumed the truth of the plaintiffs' allegation that the Secretary of Defense had not properly carried out the requirements of the Act. Thus, the *Mitchell* decision stands only for the proposition that even if the teachers had not been paid the full salaries to which they were entitled, mandamus was not the appropriate remedy. It therefore has no bearing on the present case.

III. The Issue of Periodic Adjustment

The Government argues that the salaries initially established under the 1959 Act "were generally commensurate with those paid in the United States" (Mem. in Opp. p. 2), and that the Act did not require periodic review and adjustment of these rates to keep pace with increases in salary levels in the United States. It asserts that "the statutes generally regulating the pay of federal civil servants contain no provision for mandatory increase in federal salaries to reflect a rise in comparable non-federal salaries," and that to read the 1959 Act as requiring such periodic adjustments would "confer preferred status on overseas teachers" (Mem. in Opp. p. 6).

This argument flies in the face of DoD's own interpretation of the statute. The very first rule laid down in the Salary Determination Procedures promulgated by DoD under the Act is:

> "1. *The compensation schedule will be reviewed annually.*" (Appendix B of Petition, at p. 31a)

The explanatory comment which follows this provision, after noting that "to date the Classification Act and some other white collar pay plans have not been reviewed annually," goes on to state that "it is custom-

ary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review." (*Ibid.*)

It is also clear that DoD, at the time the Wage Determination Procedures were promulgated, contemplated that there would be periodic increases in the salaries of overseas teachers. Thus, after the basic formula for computing these salaries, the following comment appears:

> "If teacher salaries continue to rise as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments." (*Id.* at 33a).

The Government's argument is therefore predicated on a misunderstanding of the facts. For it is indisputable that it was always understood by all concerned —even including DoD—that the statute contemplated that overseas teachers' salaries would be periodically adjusted so that their proper relationship with salaries paid to teachers in the United States would be maintained.

Nor can it fairly be said that this would confer a "preferred status" on overseas teachers, as the Government argues. In the first place, as the Secretary's

regulation quoted above recognizes, such periodic adjustments are customary whenever wages are tied to prevailing rates, as is the case, for example, of all blue-collar federal employees whose wages are set by "wage boards." See 5 U.S.C. §§ 5341-5343. Moreover, the wages of white collar classified employees, while not subject to automatic administrative increases, have been adjusted frequently by Congress in order to maintain approximate parity with non-governmental salary rates.[3]

Finally, the Government's argument must be rejected because it imputes to the Congress an intent which can only be described as positively malevolent. The Government's theory is that because Congress failed to increase the per pupil limitation in most of the years between 1959 and 1966, this must be taken to be an expression of Congress' intent to deny salary increases to the overseas teachers in those years. Since Congress repeatedly increased the salaries of all other federal employees in those very same years, this argument asks the Court to believe that Congress deliberately decided that although all of the millions of other federal employees were deserving of salary increases, the twenty thousand overseas teachers were not. Such an argument answers itself.

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[3] As has already been demonstrated in the Petition, the salaries of classified federal employees as well as the salaries of United States teachers rose rapidly during the period 1959-1966, while the salaries of overseas teachers, as a result of DoD's administration of the Act, fell further and further behind (Pet., p. 13, including footnotes 17 and 18).

IV. The Question of Acquiescence

The Government's Memorandum relies—as did the Court below—on the mistaken notion that the representatives of the overseas teachers acquiesced in DoD's interpretation and administration of the Act (Mem. in Opp. pp. 7-8; Pet. 16a-17a). Not only does this proposition have no support in the record but it also ignores the following stipulation, which is plainly to the contrary:

> "That when the plaintiffs and other teachers employed in the Overseas Dependents Schools were paid basic compensation at rates computed by the Department of Defense, subsequent to the enactment of P.L. 86-91, *they complained to defendant that such rates were less than the rates they were entitled to under said Act; such complaints were numerous and were made and continued from approximately the end of school year 1959-60 until the filing of the Petition herein.*" (Statement of Facts, Par. 14) (Emphasis added).[4]

That teachers or their representatives may have appeared before committees of the Congress to urge increases in the per pupil limitation does not negate this stipulation of record. The primary concern of the teachers was to obtain their proper salaries, and, since DoD had—despite their continued protests—made salary increases contingent upon increases in the per

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[4] Judge Nichols, dissenting below, noted in this regard: "The government here was on notice that its interpretation of the statute was challenged, as it does not deny, and it continued to adhere to its position, without doing anything to clear the matter up. To my way of thinking, a long continued administrative practice is on a different footing when it has ignored an equally long-continued challenge to its legality * * *." (Pet. p. 27a).

pupil limitation, they also sought to persuade Congress to increase the per pupil limitation. Certainly their efforts in this regard did not constitute acquiescence in DoD's interpretation of the statute.

Nor is there any evidence that the Congress ever acquiesced in DoD's interpretation. As has already been demonstrated in the Petition (Pet., pp. 14-16), the legislative history of the 1966 amendments indicates precisely the opposite of acquiescence. And in the years between 1959 and 1966, the only relevant legislative history is found in a 1962 report of the House Appropriations Committee, which expressly states that in refusing to grant the full per-pupil limitation increase requested by the Secretary "the Committee is not indicating its disapproval of a bona fide, justified increase in the pay of overseas teachers." H.R. Rep. No. 1607, 87th Cong., 2d Sess. p. 29. The only inference which can be drawn is that Congress believed that DoD could meet its obligations to its teachers, and still run an effective school system, with the amounts appropriated.

V. The Prospective Importance of This Case

The Government's final argument is that the question in this case is of no prospective importance because of the 1966 Amendment to the Act. There are two answers to this argument.

First, although there are approximately 20,000 overseas teachers who have claims under the 1959 Act, only 2,974 of them are involved in this case. Consequently, if e issue is not finally settled by this Court at this time, the Petitioners herein will be finally foreclosed

while the other 17,000 potential plaintiffs will still have the right to sue. Such suits can, of course, be brought in federal district courts which are not bound by the decision of the Court of Claims in this case. Indeed, a class action is already pending in the United States District Court for the Eastern District of Virginia. Thus, in order to avoid a wasteful multiplicity of litigation, as well as to avoid the inequity of conflicting results in different courts, the question should be finally settled by this Court at this time.

Second, the position which the Government has taken in this case may well affect the administration of the 1966 legislation. The Government's basic argument is that the Secretary complied with the 1959 Act by fixing overseas teachers salaries at levels which were *initially* commensurate with salaries in the United States, and that he had no obligation to keep pace with increases in United States salaries in the absence of sufficient annual appropriations. Obviously, this same argument could be made in the future, under the 1966 statute, if teachers' salaries in the United States rise faster than Congressional appropriations for the operation of overseas schools.

Stated otherwise, the basic question in this case is the relationship between substantive legislation and annual appropriations legislation, a question not unique to the 1959 Act. Indeed, in light of the very restrictive reading which the Government now seeks to place upon this Court's decisions in *United States* v. *Langston*, 118 U.S. 389 (1886), and *United States* v. *Vulte*, 223 U.S. 509 (1914), this problem is likely to recur with

considerable frequency in a variety of contexts if it is not settled finally in this case.

Respectfully submitted,

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